No. 3862

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

ELLIOTT-O'BRIEN COMPANY, a Corporation, Bankrupt

S. G. CLIMENSON, as Trustee of ELLIOTT, O'BRIEN COMPANY, a Corporation, Bankrupt.

Appellant

vs.

CARSON, PIRIE SCOTT & COMPANY, a Corporation; COFFMAN, D O B S O N BANK & TRUST COMPANY a Corporation; BEE NUGGETT PUBLISHING COMPANY, a Corporation,

Appellees

Additional Authority

SUBMITTED BY APPELLEES

A. A. HULL and J. E. MURRAY of Chehalis Washington, Attorneys for Appellee Coffman-Dobson Bank & Trust Company.

W. A. McCLURE and GEORGE N. WOODLEY, Attorneys for Appellee Carson, Pirie Scott & Company.

F. H. COLE PTG. CO., CENTRALIA

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Pursuant to permission granted by this court, the following authorities, in addition to those cited in the briefs of the appellees, are submitted:

BANK'S RIGHT OF SET-OFF

The points involved under the principle of set-off apply only to the claim of the appellee bank.

In the Bank's brief the following case was cited but with the citation to the Federal Reporter only and it is now given with the full citation, viz:

Studley vs Boylston National Bank 200 *Fed* 249; 29 *Am. B. R.* 649; 229 *U. S.* 523 57 *L. ed* 1313.

The foregoing case contains a thorough discussion of the right of the bank to set off against the depositor's obligation due it, the depositor's bank balance, and holds that if such applications are made by the check of the depositor, it is in effect the same thing as a direct application by the bank.

See also:

New York County Bank vs Massey
192 *U. S.* 138
24*S. Ct.* 199
48 *L ed* 380

to the same effect as *Studley case Supra.*

See also:

7*C. J.* 654
2 *Michie on Banks and Banking* 1019 1030
Morse on Banks and Banking (3*d ed.*)*Section* 324.
8 *Flecher Cyclopedia Corporations* 8792 *et seq.*
3 *R. C. L. Section* 81, *page* 252

The authorities cited above will clearly show the facts in the case cited by the appellant, viz.,

First National Bank vs Harper

254 *Fed.* 641

are essentially different from those in the case at bar.

Counsel for the appellant urges to this court that the question of the bank's right of set-off was not raised in the court below and regardless of the controversy between counsel over this question, the appellee bank submits that it was raised below in that the claim of bank was filed and objections to its allowance were made and filed. At a hearing on

objections, the objections are treated as the bill, and the proof of debt as the answer.

1 *Collier on Bankruptcy* (12*th ed.*) 812

and these are the only pleadings required. Such pleadings necessarily admit of any defense to the objections which may be raised.

It seems that technical pleadings are done away with and that even the trustee's objecions may be oral.

1. *Collier on Bankruptcy* (12*th ed*) 813

In this case the bank orally replied to the trustees objections.

(*Appellant's brief, page* 6)

The evidence in this case comprehended every conceivable fact and all parties in interest were present and testifying, and the relations of the bank and the depositor were fully gone into, disclosing that the issue was considered at the time of the hearing before Referee. Such a situation does away with the necessity for any pleadings.

Orr vs Park (*C. C. A. 5th Cir.*)
25 *Am. B. R.* 554
183 *Fed.* 683
In re Cannon (*D. C. Pa.*)
14 *Am. B. R.* 114
33 *Fed.* 837

In any event, this court would affirm the decision of the referee and district judge if it is legally correct, notwithstanding that it might have been decided upon a wrong theory. In other words, it matters not what theory the court adopted if its conclusion was right, it will be affirmed on appeal. This is elementary.

Title Guaranty & Surety Co., vs Coffman-Dobson etc. 97 *Wash.* 211. See page 218 as follows:

> *"Even if the theory of the trial court was erroneous, it matters not what theory it adopted as long as the conclusion is sound and the judgment can can be sustained by the evidence."*

INSOLVENCY UNDER THE STATE LAW

Appellant contends that the mere fact of inabili-

ty of a corporation to pay debts as they mature in due course of business constitutes insolvency. We submit that this is too strong a statement and that the true rule, as applied to the instant case, is that such inability constitutes merely a presumption of insolvency, which is rebuttable and which presumption has been rebutted by the facts of this case. Certainly every corporation, like every individual, has a right to continue the struggle for existence and a right to be unhampered in making that struggle, and the courts will not lay down a rule precluding it from so doing until it appears from the facts of each case that continuation of the effort is harmful to its creditors. In support of our contention we refer the court to the authorities cited in the briefs of the appellees already on file and in particular to the following:

Leslie vs Wilshire 6 *Wash.* 282, 33 *Pac.* 505
Brooks vs Skookum Mfg. Co., 9 *Wash* 80, 37 *Pac.* 284

Simons vs Cissna 52 *Wash.* 115, 100 *Pac.* 200

Johns vs Coffee, 74 *Wash.* 189. 133 *Pac.* 4

We also submit that the same test is not applied arbitrarily to all corporations regardless of the facts involved. The same test should not be applied to a corporation that cannot pay its debts as they mature in the usual course of business and which has ceased doing business, as should be applied, for instance, to a corporation which might not be able to pay its debts but which is still a going concern.

Brooks vs. Skookum Mfg. Co 9 *Wash.* 80
37 *Pac.* 284
14*a C. J.* 899, *Section* 3076.

Respectfully Submitted,

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